Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	Transmittal No. CT 3076
	)	
AT&T Communications	)	CC Docket No. 95-80
Contract Tariff No. 360	)	CC Docket No. 95-146
	)	

MCI OPPOSITION

MCI TELECOMMUNICATIONS CORPORATION

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SUMMARY

AT&T has failed miserably to show "substantial cause" and thereby acquire the right to escape its long-term tariffed service obligations to MCI. To acquire that right, AT&T would need to show that the circumstances leading up to its attempt to renege on its promises were unforeseen, radical, and beyond its control. Furthermore, AT&T would need to prove -- taking into account all relevant factors -- that requiring the performance of its obligations would result in the inflicting of serious financial injury on AT&T which, on balance, outweighed MCI's "expectation interests" in continuing to receive the AT&T service upon which it relies.

AT&T has shown none of these as, indeed, it cannot. Its alleged "losses" result from its admitted "series of mistakes," as well as "flawed procedures, and incorrect assumptions," all of which were fully within its control. In effect, AT&T's business policies, practices and personnel were the root of its problem, which cannot in any event serve as a basis for its rescue by the Commission. And, even if AT&T were to suffer financial loss -- which MCI submits would not occur over the three-year service term -- that loss would need to be measured against AT&T's 1994 profit of $4.71 billion.

AT&T's fate in the marketplace -- in its own words -- would be "swift and certain" in a negative way as a result of its "not honoring its commitments." MCI agrees completely, but is concerned with the "spillover effect" that AT&T's behavior will

have upon consumers' view of the integrity of all industry participants. Indeed, if AT&T prevails in this proceeding, MCI will lose both as a consumer and a competitor in the marketplace.

In view of the record in this proceeding, it is essential that the Commission protect consumers, its pro-competitive policies, and the integrity of the industry by rejecting AT&T's claim-of-right to abandon its service obligations to MCI. Accordingly, the Commission should promptly and decisively find and declare unlawful proposed AT&T tariff revisions that would materially and adversely affect MCI.

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MCI Telecommunications Corporation (MCI) hereby submits its Opposition to the late-filed "Direct Case of AT&T Corp." filed by AT&T Corp. (AT&T) in response to the Common Carrier Bureau's September 8, 1995 "Order Designating Issues for Investigation" (Designation Order) in the above-captioned proceeding.[1]

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[1] The Bureau suspended Transmittal No. 3076 for five months and initiated this investigation. In the Matter of AT&T Communications Contract Tariff No. 360, Order, DA 95-1244 (June 5, 1995) (Suspension Order). The docket number assigned to this investigation in the Suspension Order was 95-80, and the docket number assigned in the September 8 Designation Order was 95-146.

AT&T's Direct Case was not filed with the Commission until September 25, 1995, three days after the September 22 deadline. See "Motion For Acceptance of Late-Filed Pleading, Direct Case Of AT&T Corp. Filed One Day Late," dated September 25, 1995. MCI will not oppose this Motion although, in fact, it has been prejudiced by the tardy filing. The undersigned counsel was unaware that AT&T had served a copy of its Case on MCI Security after the close of MCI's normal business day, and no AT&T representative communicated same by telephone or otherwise to counsel. MCI Security, as is its policy, simply turned the filing over to the MCI Mailroom, which delivered it to counsel on Monday morning. On the other hand, AT&T had a copy of MCI's timely-filed Case on Friday. In any event, MCI was deprived of two full days' review of the Case under the circumstances, which is no inconsequential matter given the Bureau's extremely truncated schedule in this proceeding.

BACKGROUND AND SUMMARY

This proceeding is critical to the Commission's pro-competitive policies, as its outcome likely will affect dramatically competition in the interexchange marketplace by defining more clearly a carrier's duty to perform on its obligations, as well as the precept of "general availability" -- a keystone of the Commission's approach toward assuring lawful carrier offerings. The question squarely presented for resolution is whether a carrier can escape its service obligation if it subsequently chooses not to perform on a long-term contract, even though performance would not at all affect its viability.

It would turn "substantial cause" on its ear if AT&T were easily permitted to escape long-term commitments it knowingly and willingly made and even reconfirmed in later tariffing submissions. This is because excuses for its non-performance really have no relevance in this controversy. Indeed, the Commission has never allowed, nor should it, substantial cause to apply in situations over which a carrier has, or could have exercised, full control. The standard should apply, if at all, only in circumstances where factors influencing the need for non-performance are "external;" that is, when they are beyond the ability of the carrier to control. Any other result would gravely distort the marketplace, including the ability of consumers to rely upon transactions they had entered with carriers.

Thus, in a broader sense, this proceeding will determine whether the Commission's "substantial cause" test has any meaning within the context of AT&T's contract-tariffs or any other term-type services subject to streamlined regulation. And consumers are squarely faced here with the question of whether their expectations will be met by AT&T, or whether AT&T will be permitted to avoid its commitments when it suits its tactical purposes. In this latter regard, the entire telecommunications industry is following this proceeding to learn whether carriers will be bound to honor their commitments. A victory for AT&T will signal that carrier promises simply aren't worth much; while its defeat will indicate the opposite, specifically, that there is and will be integrity in transacting in the interexchange marketplace.

In an effort to defend its actions, AT&T has invented its own self-serving version of substantial cause which, not surprisingly, it satisfies, because a carrier always could pass its version. In fact, AT&T essentially has interpreted substantial cause out of existence. In its flawed approach, there is no balancing of interests of customer and carrier, as the Commission contemplates; rather, the carrier's interests are paramount and the customer's interests are subordinate, if not ignored altogether. This would be the result even when the carrier's claims of "loss" are grossly exaggerated, as is the case here, or when, on balance, the customer's reliance needs outweigh any carrier loss.

Under AT&T's formulation, commercial contract law principles are not "highly relevant," as the Commission has decreed; they are irrelevant. In AT&T's construct, substantial cause only would apply in extraordinarily narrow circumstances -- which the carrier could easily avoid -- and then only to the initial customer under a contract-tariff and not to subsequent customers, such as MCI in this case, notwithstanding that the Commission never has made -- nor should it -- any such distinction. In sum, AT&T seeks in this case to render the substantial cause concept essentially meaningless.

As originally intended, real substantial cause respects the significant interests of customers in the durability of carrier promises. The real standard presumes that a carrier will adhere to its commitments in the absence of radical and unforeseen developments over which the carrier has no control. That standard affords customers the benefits from stable contractual arrangements and does not leave them -- as AT&T proposes to do here -- in peril.[2]

Here, for competitive reasons, AT&T is attempting to deny

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[2] As MCI noted in its Direct Case (at 4, n.4), it is of no consolation to affected customers if AT&T is permitted to escape its obligations by permitting customers to escape theirs in turn. One wonders what AT&T's response would be if a customer under a contract-tariff approached AT&T with a "requirement" that AT&T reduce its prices by fifty percent for the duration of the contract and that, if AT&T refused to do so, it alternatively would have thirty days to terminate the business arrangement without liability.

MCI service under a contract-tariff upon which MCI is reliant.[3] And AT&T's justification for its action rests on allegations of financial harm that both Common Carrier Bureau staff and MCI have thoroughly discredited.

As noted above, and as must be emphasized, the regulator's obligation in this case is straight-forward. If AT&T is permitted to escape its obligations here, then carriers will be allowed to change contract-tariffs as easily as they can change any other tariffs subject to streamlined regulation. However, substantial cause requires much more. If that standard is to have the significance attributed to it by the Commission[4], and if it is to continue to have any meaning or relevance in the future, it must be found that AT&T has failed to justify its proposed changes to Contract-Tariff No. 360 and, accordingly, those changes are unlawful.

AT&T HAS NOT JUSTIFIED ITS PROPOSED CONTRACT-TARIFF CHANGES ON SUBSTANTIAL CAUSE GROUNDS

As MCI demonstrated in its Direct Case, in applying substantial cause, it is immaterial that AT&T's Contract-Tariff

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[3] See "Direct Case Of MCI Telecommunications Corporation," dated and filed on September 22, 1995, at Attachment A; see, also, Affidavit of Nick Abate, which is appended hereto and incorporated herein, at Para. 5 (Abate Affidavit).

[4] Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562, 4570-74 (1995) (Interexchange Reconsideration Order). See Tariff Filing Requirements for Nondominant Carriers, FCC 95-399, released September 27, 1995 at ¶¶ 14-16.

No. 360 is subject to streamlined regulation. The Commission developed substantial cause to protect important customer interests in the durability of carriers' long-term tariff commitments, irrespective of the regulatory regime governing the tariff at issue.[5] Thus, substantial cause must be applied here in the same manner as it has been in the past because MCI's expectations bear no relationship whatsoever to the nature of regulation governing AT&T's contract-tariffs. Accordingly, AT&T must overcome the same obstacles to reneging on its promises here as it would incur in undertaking to modify any tariff not subject to streamlined regulation. As the Commission has explained, "[t]he basis for the substantial cause test is the apparent unfairness of allowing a carrier to alter material provisions of a long-term tariff when customers have agreed to take service under the understanding that, by offering such terms, the carrier has sacrificed some of its traditional flexibility to revise its tariff at any time."[6]

In light of the Commission's determination to require carriers to treat customers of long-term tariffs equitably, it has accepted substantial cause justifications to change such tariffs only in very unusual circumstances, i.e., where

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[5] See RCA American Communications, Inc., 86 FCC 2d 1197 (1981); Memorandum Opinion and Order, 94 FCC 2d 1338 (1983); Memorandum Opinion and Order, Mimeo No. 6153 (rel. Aug. 6, 1985); Memorandum Opinion and Order, 2 FCC Rcd 2363 (1987) (collectively, RCA Americom), see Showtime Networks, Inc. v. F.C.C., 932 F.2d 1 (D.C. Cir. 1991); AT&T Communications, Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 2404 and 2535, 5 FCC Rcd 6777 (1990).

[6] RCA Americom, 2 FCC Rcd at 2373.

extraordinary and unforeseen events have occurred.[7] However, in this case, AT&T makes no allegations, as indeed it could not, that any adverse financial consequences it claims it will suffer if it is obliged to honor its commitments to MCI were beyond its control, either originally or when it later modified the offering via subsequent tariff changes. Indeed, AT&T candidly admits that the offering was the product of "a series of mistakes, flawed procedures and incorrect assumptions by the AT&T people who were filing the tariff."[8] It would be a gross understatement to say that, if these are grounds for substantial cause, then that standard will be taking on an entirely new meaning.

Since AT&T cannot support its action here under substantial cause principles developed by the Commission,[9] it invents its own standard, claiming that it "should only be required to demonstrate as its prima facie substantial cause showing that it has offered a commercially reasonable explanation of its decision to alter the terms pursuant to which it offers service."[10] This convenient formulation simply would negate substantial cause because a "commercially reasonable explanation" is all that AT&T ever needs to supply, at most, to justify changing its standard

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[7] See RCA Americom, supra.

[8] AT&T Direct Case at 2.

[9] If the Common Carrier Bureau decides this case, it is bound by Commission precedent and could not possibly interpret substantial cause to exist in connection with the grounds raised by AT&T in this proceeding.

[10] Id. at 6-7 (Emphasis supplied).

tariff offerings to which substantial cause does not even apply, given the absence of term commitments therein.

However, it is undisputed that substantial cause places an additional burden on a carrier to justify any proposed tariff change -- one that exceeds the conventional obligation to justify modifying a streamlined regulated tariff. If this were not the case, there would be no reason to apply substantial cause to contract-tariff changes. Unfortunately for AT&T, the Commission has recently affirmed, somewhat emphatically, that substantial cause must be applied in the context of contract-tariffs.[11]

In the Interexchange Reconsideration Order, the Commission made it clear that AT&T has a heavy burden to justify changing contract-tariffs in light of the binding contract-like nature of such offerings. It noted that "[i]n applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff should carry certain consequences."[12] Thus, the Commission concluded, "[g]iven the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assessment of whether a contract-based tariff revision is just and reasonable under the substantial cause test."[13]

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[11] See Interexchange Reconsideration Order, supra.

[12] Id. at ¶ 25.

[13] Id.

AT&T's interests here are not advanced by applying contract law principles because it could not sustain its position under them. There simply is no way that it would prevail based upon its representations that the subject offering resulted from "a series of mistakes" or from "flawed procedures, and incorrect assumptions." These are not bases upon which courts traditionally have permitted parties to transactions to escape from them.

Further, AT&T argues that "the only basis for infringing" upon its right to alter its tariff is "if the carrier, within the tariff, creates a reasonable expectation that it has made a commitment, supported by mutual undertakings of carrier and customer, not to alter those terms."[14] In other words, according to AT&T, substantial cause would apply only when a carrier makes and tariffs an express commitment not to alter a contract tariff. Under this self-serving formulation, a customer would be bound in all respects by a contract-tariff but, if the tariff did not explicitly state that the carrier would refrain from changing its terms, the carrier could alter the tariff terms without limitation or impunity, and without demonstrating substantial cause. This construction of substantial cause has absolutely no basis in Commission precedent, logic or equity and, in fact, was repudiated by the Commission in RCA Americom when the Commission observed that it

strikes us as anomalous that a carrier could use the

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[14] AT&T Direct Case at 7-8 (Emphasis in the original).

> tariff filing process to prevent any of its service terms from being enforced against it by customers, while at the same time bind customers to all the tariff provisions for as long as the carrier wishes until expiration of the terms by operation of the tariff itself.[15]

In developing substantial cause, the Commission clearly did not intend to provide carriers with "escape clauses" that allow them to avoid the ramifications of their own actions; that is, actions over which they had, or could have exercised, control. Here, AT&T seeks to avail itself of a theory that, in the end, would encourage the very kind of carrier conduct that underlies this case.

It is especially noteworthy that AT&T can point to no Commission authority to support its interpretation of its claimed rights under substantial cause. Indeed, inherent in that standard is the premise expressed in the above Commission passage that, in offering a long-term tariff arrangement, a carrier cannot change that tariff irrespective of any representations in

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[15] RCA Americom, 84 FCC 2d at 389. It strikes MCI as incongruous that AT&T would argue that it could commit in a contract with a customer but then escape that commitment by not specifically tariffing its permanence. This approach seems to run counter to AT&T's professed interest in "want[ing] to maintain its reputation as a carrier that honors its undertakings to customers." See In The Matter of AT&T Contract Tariff No. 374, Transmittal Nos. CT 2952 and CT 3441, "Direct Case Of AT&T Corp.," dated August 25, 1995, at 9, n. 15, CC Docket No. 95-133. In its Direct Case herein (at 7), AT&T asserts that "if any carrier develops a reputation for not honoring its commitments, marketplace regulation of that carrier will be swift and certain." AT&T's concern about preserving a good reputation is complemented by the Commission's determination, correct in all respects, that "[i]f a carrier attempts making [material tariff revisions to a contract deal] ..., it risks losing the future business of the affected customers and damaging its own reputation in the marketplace." Interexchange Reconsideration Order at para. 24.

the tariff, absent substantial cause.

AT&T also claims, falsely, that MCI had no expectation interests that AT&T would not alter Contract Tariff No. 360 in purchasing the service, and argues that AT&T's interests in avoiding the financial harm it alleges would result from not altering that tariff must be given precedence.[16] AT&T further contends that MCI ordered service under a generally available tariff, did not negotiate the terms of the contract and that, accordingly, there was no mutuality of commitment or detrimental reliance by MCI.[17] In other words, in AT&T's simplistic view, there can be no legitimate balancing of interests between customer and carrier here; and MCI's interests should be disregarded because they are inferior to AT&T's. This position simply is not sustainable.

First, AT&T's allegations of the financial harm it will experience under Contract-Tariff No. 360 are wrong because that offering will not in any respect have the negative effects asserted by AT&T. Thus, for example, the "losses" plainly are overstated and, indeed, if any losses are suffered over the service term, they would be insignificant, given AT&T's financial stature.

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[16] However, nowhere in its claims regarding the alleged financial harm it will suffer if it is required to perform on its Contract-Tariff No. 360 obligations does AT&T mention the dollar figure it should in addressing the impact of any losses, specifically, $4.71 billion, which amount constituted AT&T's 1994 profit.

[17] AT&T Direct Case at 8-10.

Second, in subscribing to Contract-Tariff No. 360, MCI had the identical expectation interests that AT&T would honor its commitment under the tariff as did the original customer.[18] Moreover, in subscribing to Contract-Tariff No. 360, MCI accepted the same obligations as the original customer and, by the same token, AT&T had the same obligation to both MCI and the original customer to adhere to its filed contract-tariff, absent demonstrable substantial cause under Commission precedent. Therefore, MCI and AT&T had the same "mutuality of commitment" as AT&T had with the original customer.

MCI thus does not understand the claim that a distinction must be made between the original customer of a contract-tariff and subsequent customers who take under "general availability" by meeting all the eligibility requirements established by the carrier prior to their subscribing to service. Not only would this distinction, if recognized, undermine the Commission's essential general availability "market rule," which is of great importance in today's telecommunications environment, it makes no sense logically to conclude that the original customer -- simply because it happened to negotiate the service arrangement --

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[18] AT&T claims that MCI knew at the time its order for service was accepted by AT&T that AT&T was going to undertake to revise the terms and conditions, including pricing, of the subject offering. Although true, the fact remains that MCI had no such inkling when it placed its order for Contract-Tariff No. 360 service on December 7, 1994. Indeed, it wasn't until twelve days after MCI placed its order, on December 19, that MCI learned that AT&T was planning to modify the service, although no particulars were revealed at that time. See Abate Affidavit at Para. 6. Thus, despite AT&T's suggestions to the contrary, the record could not support any finding that MCI somehow took unfair advantage of AT&T.

somehow has greater reliance on, and acquires greater rights in, the offering than do subsequent customers. All customers who subscribe to long-term service arrangements are equally dependent on that offering to the extent they reasonably expect it to be and remain available to them under agreed-to terms throughout the service term. Accordingly, to weigh reliance in the manner suggested by AT&T is simply wrong.

In addition, like the original customer, MCI had attempted to negotiate with AT&T to acquire a customized service arrangement that was most useful to MCI. Those negotiations were singularly unproductive, however, as AT&T proved most unresponsive.[19] Given the pending expiration of an AT&T Tariff 12 service arrangement upon which MCI relied, coupled with its inability to conclude a replacement service perhaps involving all MCI services acquired from AT&T, MCI evaluated and eventually ordered other AT&T offerings, including Contract-Tariff No. 360.[20]

In any event, it is wrong to suggest, as AT&T has done, that MCI happened by accident upon an AT&T mistake and unfairly is seeking to exploit that mistake to its advantage. That simply is not the case, particularly since Contract-Tariff No. 360 is somewhat similar to the service MCI had unsuccessfully sought to acquire from AT&T via its own negotiation.

AT&T futilely attempts to denigrate MCI's expectation

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[19] See Abate Affidavit at 3.

[20] Id. at Para. 4.

interests by arguing that it gave MCI "notice" of the possible change to Contract-Tariff No. 360 when it accepted MCI's service order.[21] As noted above, however, MCI's order placement and AT&T's acceptance were relatively far apart, and MCI did not in fact learn of any planned changes to Contract-Tariff No. 360 until after it had made a decision to order service and had done so within the ordering "window."[22] In any event, AT&T's "notice" here is of no significance whatsoever, legal or practical. Legally, its proposed and filed tariffs are neither "accepted" nor "approved" absent, respectively, their being allowed to take effect and their being found lawful in a Section 204 or 208 investigation under the Communications Act. And, as noted throughout the record in this proceeding, it was incumbent on AT&T to provide a substantial cause basis to modify the tariff in any way that materially and adversely affected its customers because of the long-term nature of the offering. Absolutely none of these requirements was so "automatic" as to cause -- or require -- MCI to withdraw or cancel its service request simply because AT&T announced that it was planning to revise Contract-Tariff No. 360.

With particular regard to MCI's reliance on Contract-Tariff No. 360, said offering, as explained fully in MCI's Direct Case, uniquely fulfills important needs for MCI, including redundancy, network extension, and outage protection, and it provides a long-

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[21] AT&T Direct Case at 10.

[22] See Abate Affidavit at Para. 6.

term reasonable, stable rate arrangement with access to AT&T's favorable net settlement arrangements.[23] And, AT&T's claim that modifications to Contract-Tariff No. 360 that would force MCI to abandon the offering are of no consequence because MCI has available to it ready alternatives in the marketplace simply is untrue. As MCI has shown on the record in this proceeding, the subject offer uniquely fulfills its service needs and requirements.

In addition to Contract-Tariff No. 360, MCI in fact currently subscribes to two other contract-tariffs (Contract-Tariff No. 1289 and Contract-Tariff No. 419) for international usage.[24] Contract-Tariff No. 1289 was ordered as an interim measure to "bridge" the period between the expiration of MCI's Tariff 12 service and the implementation of the new customized service arrangement MCI was actively -- but unsuccessfully -- seeking from AT&T. Excluding the application of volume discounts, the rates offered under Contract-Tariff No. 1289 are identical to those offered under AT&T Tariff FCC No. 1 -- AT&T's standard services tariff -- for SDN service. As for volume discounting, Contract-Tariff No. 1289 provides MCI with an incremental discount of 2 percent over the comparable (five year) term and volume discount plans available under AT&T Tariff FCC No 1.

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[23] MCI Direct Case at 17-18, Affidavit of Anthony Cirieco; see, also, Abate Affidavit at 6.

[24] See Abate Affidavit at 4.

In addition to rate differences affecting a number of countries, another deficiency in AT&T Contract-Tariff No. 1289 (versus Contract-Tariff No. 360) is a lack of rate stability. Rate levels in Contract-Tariff 1289 can effectively be increased at any time, similar to what occurred in March 1995. Even excluding the possibility of potential increases, the rates still are not stable and, therefore, uncertain because they are dependent upon the total gross billed amount for any given month.

Contract Tariff No. 419, like Contract-Tariff No. 360, was subscribed to as a result of AT&T's refusal to entertain seriously negotiations for a new customized arrangement. That offering contains some favorable pricing (versus Contract-Tariff No. 1289), but to a different subset of countries than does Contract-Tariff No. 360. And, while Contract-Tariff No. 419 offers rate stability, it does so for only two years (versus three years under Contract-Tariff No. 360). And, in contrast to Contract-Tariff No. 360, the average rate per minute varies substantially, depending upon the actual duration of a particular call.

In view of this, any AT&T "notice" given to MCI that AT&T might attempt to change the then-existing business arrangement was of no particular significance to MCI because there was no readily available substitute for Contract-Tariff No. 360. In any event, AT&T's argument misses the point completely: a customer is entitled to reasonably rely on a contract-tariff commitment for

which it is eligible, unless the offering carrier can demonstrate substantial cause to change it. Moreover, AT&T's wrong-headed suggestion that it can avoid the application of substantial cause merely by giving interested parties some form of vague notice that it intends in the future to change a contract-tariff is totally lacking in legal support.[25] The Commission has never indicated that a carrier can escape a substantial cause showing by simply giving a customer notice of an upcoming tariff change proposal prior to the customer's first obtaining service.

In any event, the substantial cause test does not distinguish between tariff changes affecting the original customer versus a subsequent customer or customers. As to both customers, commercial contract law principles are therefore equally "highly relevant." MCI demonstrated in its Direct Case that, in applying those principles, the Commission must conclude that AT&T has not demonstrated substantial cause in this case.[26] AT&T seeks to avoid the certain result of applying those principles by arguing that, as to MCI, there was no contract.[27] This is simply another version of AT&T's fallacious argument that the substantial cause test should only apply to the original customer to a contract-tariff, and it is illogical on its face. Under AT&T's theory, it could change at will a contract-tariff with respect to customers other than the original customer

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[25] See Attachment to **Abate Affidavit**.

[26] MCI Direct Case at 13-16.

[27] AT&T Direct Case at 8-9.

because, as to those customers, there is no contractual relationship.[28] The Commission, however, has never suggested that substantial cause be applied only to the original customer of a contract-tariff.

Furthermore, AT&T's formulation treats similarly situated customers differently because it would allow the original customer to benefit from substantial cause -- and thereby possibly avoid any tariff changes -- but deny the benefits of that standard to subsequent customers. AT&T's theory thus would lead to an anomalous result, not to mention unlawful discrimination: AT&T would be required to adhere to a contract-tariff with regard to the original customer, but it would be allowed to change the same tariff for the same service for subsequent customers of the same contract-tariff. This result would be patently illegal, in plain violation of Section 202(a) of the Communications Act, and, not surprisingly, the approach has never been endorsed by the Commission.

AT&T'S POSITION THAT OTHER OF ITS BELOW-COST SERVICE OFFERINGS ARE UNAFFECTED BY THIS PROCEEDING IS UNTENABLE

AT&T contends that the "relevant costs" to be considered in this proceeding are the costs associated with providing service under Contract-Tariff No. 360 alone and that, accordingly, any

[28] AT&T's position is belied in any event by the fact that there is a duly executed "Agreement" underlying the filed contract-tariff itself. This agreement, of course, would become the basis of the relationship between the parties if the tariffing requirement were to be removed.

ability to raise its rates that results from this proceeding imposes no obligation on it to raise its below-cost rates in its other offerings.[29] This approach, if permitted, would allow AT&T, as MCI indicated in its Direct Case,[30] to "manipulate the interexchange market by offering below-cost pricing whenever it needed to win business, and then disavow that pricing whenever it decided to abandon its commitment." Of course, this would be the best of all competitive worlds for AT&T: To charge whatever it decides, cost considerations aside, and then deliver whenever it chooses -- pulling back on its promises after customers were hopelessly "locked in." Such a practice would constitute a per se violation of Section 201(b) of the Act, which requires that all carrier charges and practices be just and reasonable.

AT&T argues that it would be inappropriate to take into account the profitability of other services provided to MCI because that would be "a radical departure from existing practice ...."[31] What AT&T fails to recognize, however, is that its conduct resulting in this proceeding was itself radical under any measure, therefore calling for an appropriate response from the Commission. MCI submits that the proper measure must involve an assessment of the overall business relationship between AT&T and MCI in order to determine whether AT&T is suffering any losses that would warrant and justify rectification via

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[29] AT&T Direct Case at 10-13.

[30] At 19.

[31] AT&T Direct Case at 11.

prospective tariff adjustments.[32] In the alternative, AT&T must be prepared to accept responsibility for modifying other of its customer service arrangements that include prices that are equally low or lower than those contained in Contract-Tariff No. 360. Otherwise, AT&T, as noted, would be given free reign to charge whatever and whenever it wants.

AT&T's position with regard to the third alternative (i.e., "whether AT&T recovers its cost for all services of the sort referenced in Contract Tariff 360") is particularly deficient. First, AT&T never responds to the question propounded by the Commission choosing, instead, to assert simply that no two contract-tariffs are "like" and thereby implying that it would be impossible to ascertain the profitability of other contract-tariff offerings. This is pure makeweight. If AT&T can measure the profitability of Contract-Tariff No. 360 in terms of MCI's subscription to that service, it can likewise measure the profitability of all its other contract-tariffs across all its customers, whether that measure is based upon historical data or

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[32] AT&T's representation (Direct Case at n. 30) of the current rate structure under its Contract-Tariff No. 360 versus MCI's other AT&T services is seriously flawed. AT&T erroneously includes an additional discount of approximately 9.5 per cent above and beyond the applicable discounts currently available under Contract-Tariff No. 360. The effective after-discount rates for AT&T Contract-Tariff No. 1289 are grossly overstated. In this instance, AT&T based the first of two discounts noted in Section 5 on a monthly prorated portion of the Minimum Annual Revenue Commitment instead of an average of MCI's actual billed usage charges. AT&T also excluded entirely the availability of an additional 13 percent discount applicable to International usage.

projected usage.[33] Moreover, since AT&T steadfastly refused to negotiate a customized service arrangement with MCI, which might have had the result of consolidating all MCI services acquired from AT&T under one arrangement, AT&T's overall profitability from MCI's business takes on even greater significance.

Further, AT&T contends that it would be inappropriate "to subsidize MCI's usage under CT360" with other AT&T services acquired by MCI, characterizing the latter as "ad hoc 'baskets' of services."[34] Ironically, the proposed tariff revisions that are the subject of this proceeding, if allowed to become effective, would be subsidizing the purported deficiencies in the current version of Contract Tariff 360. This would occur because MCI, if it chose to remain a customer, would become subject, once it generated $2 million in international usage, to the same rates specified in AT&T Tariff FCC No. 1 -- without the benefits of any discounts that are available to other AT&T customers under that Tariff.

And, AT&T's citation to its regulation under Price Caps (Direct Case at 13, n.31) with its claim that such an approach would increase complexities involved in allocating exogenous

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[33] AT&T also claims (Direct Case at 12) that "analysis of whether service offerings in general are above costs would seem irrelevant and bad public policy." The meaning of this statement is lost upon MCI. Suffice it to say that, historically, service costs have always been the point-of-departure for any analysis of lawfulness under the anti-trust laws and the Communications Act of 1934.

[34] AT&T Direct Case at 13.